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FILED
DISTRICT COURT OF GUAM

FEB 16 2005

MARY L.M. MORAN
CLERK OF COURT

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

JULIE BABAUTA SANTOS, et. al.,
Petitioners,

-v-

FELIX P. CAMACHO, etc., et. al.
Respondents.

CIVIL CASE NO. 04-00006

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISQUALIFY
ATTORNEY GENERAL'S OFFICE

[ORAL ARGUMENT REQUESTED]

D050210.382-00010[Mtn to Disqualify]v4

ORIGINAL

The Governor of Guam, Felix P. Camacho hereby files this memorandum of points and authorities in support of his motion to disqualify the Office of the Attorney General from representing Respondent Government of Guam in this matter. Such representation is prohibited by Guam Rules of Professional Conduct 1.7, 1.9, and 1.11.

INTRODUCTION

The January 25, 2005 hearing revealed in dramatic fashion that the Attorney General's Office has become directly adverse to the Respondents on whose behalf it had been appearing as counsel of record. After subpoenaing their own clients, (including the Governor) to testify at that hearing, Assistant Attorneys General questioned their own clients in a manner designed to harass and intimidate. They even went so far as to request permission to treat one of their own clients as a hostile witness.

Switching sides against ones own clients in the course of litigation is expressly prohibited under the rules that govern attorney conduct in this jurisdiction. Guam Rules of Professional Conduct (“G.R.C.P.”), Rules 1.7, 1.9, 1.11. Rule 1.7 prohibits an attorney from representing a party directly adverse to an existing client, as the Attorney General’s Office did at the hearing on January 25, 2005. Rule 1.9 prohibits an attorney from representing a party directly adverse to former clients in the same matter, as the Attorney General’s Office clearly intends to do as this case continues. Rule 1.11 expressly applies Rules 1.7 and 1.9 to lawyers serving as public officers or employees. That includes the Attorney General’s Office.

The unfair and inappropriate conduct by the Attorney General's Office prompted counsel for the Governor to advise the Court during the January 25 hearing that if the Court were to permit the Governor to proceed with separate counsel, the Governor would likely bring a

1 motion to disqualify the Attorney General from continuing to represent any party adverse to the
2 Governor in this case.

3 On February 9, 2005, the Court denied the Attorney General's Motion to Strike
4 and permitted the law firm of Calvo & Clark to substitute as counsel of record for the Governor,
5 and permitted Attorney Rawlen Mantanona to substitute as counsel of record for Respondents
6 Perez and Ilagan. The Court permitted the Attorney General to remain in the case as counsel of
7 record for Respondent Government of Guam. Thereafter, counsel for the Governor respectfully
8 requested that the Attorney General's Office withdraw as counsel of record for the Government
9 of Guam so that the instant motion to disqualify would not be necessary. The Attorney General's
10 Office has refused to withdraw, and the Governor must now proceed with this motion to
11 disqualify.
12

13
14 **I. THE ATTORNEY GENERAL SWITCHED SIDES AGAINST HIS OWN**
15 **CLIENT IN THE SAME MATTER – DISQUALIFICATION IS NOW**
16 **MANDATORY UNDER RULES 1.7 AND 1.9.**

17 **A. Rule 1.7 Requires Disqualification**

18 The Guam Rules of Professional Conduct ("G.R.C.P.") are based on the ABA
19 Model Rules of Professional Conduct. See Supreme Court of Guam Promulgation Order No. 04-
20 002, Feb. 11, 2004. G.R.P.C. 1.7, entitled "Conflicts of Interest: Current Clients," provides, in
21 relevant part:

22 [A] lawyer shall not represent a client if the representation involves a concurrent
23 conflict of interest. A concurrent conflict of interest exists if:

24 (1) the representation of one client will be directly adverse to another
25 client; or

26 (2) there is significant risk that the representation of one or more
27 clients will be materially limited by the lawyer's responsibilities to another client,
28 a former client or a third person or by a personal interest of the lawyer.

1 Rule 1.7 protects the trust and loyalty that forms the foundation of the attorney-
2 client relationship. *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16, 25 (Mich.
3 App. 2000) (“human nature being what it is, a dual relationship involving adverse or conflicting
4 interests, constitutes enormous temptation to take advantage of one or both parties to such
5 relationship” ... “[t]he purpose of [the conflict of interest rules] is to condemn the creation and
6 existence of the dual relationship instead merely of scrutinizing the results that may flow
7 therefrom.”) (quoting State Bar of Michigan Ethics Committee Formal Opinion 160) (emphasis
8 in original). Rule 1.7 is so strict that an attorney may not represent a party adverse to an existing
9 client even in a wholly unrelated matter. The basic idea behind Rule 1.7 is explained as follows
10 in the official ABA Comments:
11

12 Loyalty to a current client prohibits undertaking representation directly adverse to that
13 client without that client’s informed consent. Thus, absent consent, a lawyer may not act
14 as an advocate in one matter against a person the lawyer represents in some other matter,
15 even when the matters are wholly unrelated. The client as to whom the representation is
16 directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer
relationship is likely to impair the lawyer’s ability to represent the client effectively.

17 Comment [6] to ABA Model Rule of Professional Conduct 1.7.

18 Where, as in this case, an attorney violates Rule 1.7 by switching sides against his
19 client *in the same matter*, disqualification is mandatory and cannot be avoided even if the attorney
20 stops representing of one of the two adverse clients. *Picker Int’l, Inc. v. Varian Assocs., Inc.*, 670
21 F. Supp. 1363, 1365 (N.D. Ohio 1987); *Int’l Longshoremen’s Ass’n Local Union 1332 v. Int’l*
22 *Longshoremen’s Ass’n*, 909 F. Supp. 287, 293 (E.D. Pa. 1995); *City Studios, Inc. v. Reimerdes*,
23 98 F. Supp. 2d 449 (S.D.N.Y. 2000).

24 There can be no doubt that the Attorney General’s Office has switched sides in this
25 case. As the Court noted in its February 9, 2005 Order, the Attorney General filed pleadings on
26 behalf of the Governor against the Governor’s express instructions. (Feb. 9, 2005 Order at 3).

1 The Attorney General subpoenaed his own clients. The Attorney General repeatedly asked his
2 own clients leading questions. (*E.g.*, RT 19:5-9, 25:17-20, 26:2-28:15, 36:20-37:2.)¹ The Court
3 expressly recognized the open hostility by the Attorney General when it overruled an objection on
4 the ground that the questions were leading, stating: “The matters before the Court seem to be
5 hostile enough to allow leading questions to be asked.” (RT 36:12-18.) And when the Governor
6 hired Calvo & Clark to represent him, the Attorney General quickly moved to strike Calvo &
7 Clark’s appearance on behalf of the Governor. (Feb. 9, 2005 Order at 3). Thus, even though the
8 Court denied the Attorney General’s Motion to Strike and substituted Calvo & Clark as counsel
9 for the Governor, the Attorney General has already violated Rule 1.7. The Attorney General can
10 no longer represent either side in this dispute. Disqualification is now mandatory.

11
12 **B. Rule 1.9 Requires Disqualification**

13 Because the Attorney General switched sides against his client *in the same matter*,
14 the analysis is essentially the same under both Rules 1.7 and 1.9. Rule 1.9(a) provides:

15
16 A lawyer who, has formerly represented a client in a matter shall not thereafter represent
17 another person in the same or substantially related matter in which the person’s interests
18 are materially adverse to the interests of the former client unless the former client gives
informed consent, confirmed in writing.

19 G.R.P.C. 1.9(a).

20 Like Rule 1.7, Rule 1.9 is derived from the fundamental duty of loyalty owed by
21 all attorneys to their clients. The ABA Canons of Professional Ethics, the precursor to the ABA
22 Model Rules, require that lawyers represent their clients zealously, and maintain the confidences
23 of their clients with complete and undivided loyalty. The application of the rule regarding
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27 ¹ See Reporter’s Transcript of the January 25, 2005 hearing filed February 7, 2005. The
28 cited excerpts are attached hereto for the Court’s convenience.

1 former-client conflicts, and the importance of applying it strictly, was articulated in *T.C. Theatre*
2 *Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953).

3 [T]he former client need show no more than that the matters embraced within the pending
4 suit wherein his former attorney appears on behalf of his adversary are substantially
5 related to the matters or cause of action wherein the attorney previously represented him,
6 the former client. The Court will assume that during the course of the former
7 representation confidences were disclosed to the attorney bearing on the subject matter of
8 the representation. It will not inquire into their nature and extent. Only in this manner can
9 the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to
10 privileged communications be maintained.

11 *Id.* at 268-69.

12 The Supreme Court and the Ninth Circuit recognize the basic purpose to be served
13 by the strict application of the former-client conflict rule, namely, the preservation of the integrity
14 of the legal profession and the avoidance of even the appearance of professional impropriety.

15 There are few of the business relations of life involving a higher trust and confidence than
16 that of attorney and client, or, generally speaking, one more honorably and faithfully
17 discharged; few more anxiously guarded by the law, or governed by sterner principles of
18 morality and justice; and it is the duty of the court to administer them in a corresponding
19 spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be
20 used to the detriment or prejudice of the right of the party bestowing it.

21 *Stockton v. Ford*, 52 U.S. 232, 247, 11 How. 232, 13 L.Ed. 676 (1850).

22 The former-client conflict rule is violated when a lawyer takes on representation of
23 a new client against a former client in the same matter regardless of whether confidential
24 information was ever actually received from the former client. *Trone v. Smith*, 627 F.2d 994, 998-
25 99 (9th Cir. 1980) (emphasis added); *David Welch Co. v. Erksine & Tulley*, 203 Cal.App.3d 884,
26 891 (Cal. 1988) (emphasis added; *Damron v. Herzog*, 67 F.3d 211,215 (9th Cir. 1995); *Straub*
27 *Clinic & Hosp. v. Kochi*, 917 P.2d 1284, 1288-89 (Haw. 1996).In *Trone v. Smith*, the Ninth
28 Circuit explained the importance of a strict application of the former-client conflicts rule:

The interest to be preserved by preventing attorneys from accepting representation adverse
to a former client is the protection and enhancement of the professional relationship in all

1 its dimensions. It is necessary to preserve the value attached to the relationship both by
2 the attorney and by the client. These objectives require a rule that prevents attorneys from
3 accepting representation adverse to a former client if the later case bears a substantial
4 connection to the earlier one.

...

5 Both the lawyer and the client should expect that the lawyer will use every skill,
6 expend every energy, and tap every legitimate resource in the exercise of independent
7 professional judgment on behalf of the client and in undertaking representation on the
8 client's behalf. That professional commitment is not furthered, but, endangered, if the
9 possibility exists that the lawyer will change sides later in a substantially related matter.
Both the fact and the appearance of total professional commitment are endangered by
adverse representation in related cases. From this standpoint it matters not whether
confidences were in fact imparted to the lawyer by the client. The substantial relationship
between the two representations is itself sufficient to disqualify.

10 The rule we state is necessary to implement the following canons of professional
11 ethics: Canon 1 (maintaining integrity and confidence in the legal profession); Canon 4
12 (preserving confidences and secrets of a client); Canon 5 (exercise of independent
13 professional judgment); Canon 6 (representing a client competently); Canon 7
14 (representing a client zealously within bounds of the law); Canon 9 (avoiding even the
15 appearance of professional impropriety).

16 *Trone v. Smith*, 627 F.2d at 998-99.

17 There is absolutely no ambiguity in Rule 1.9(a)'s prohibition against former-client
18 conflicts. If a lawyer used to represent a client in a particular matter but no longer does so, that
19 lawyer is disqualified from representing a different party in that same matter if the different party
20 has interests "materially adverse" to the former client. In short, a lawyer may not switch sides in
21 litigation.

22 The Attorney General's Office initially appeared on behalf of the Governor *in this*
23 *case* and advised him that he should go along with the proposed settlement even though it is
24 unlawful. Later, the Attorney General's Office *in this same case* ignored the Governor's
25 instructions and became the Governor's adversary. There can be no clearer example of switching
26 sides.

1 If the Attorney General is allowed to continue on behalf of the Government, the
2 situation will only get worse as the case moves toward a hearing on the settlement and the merits
3 of the Administration Plan. Now that the Governor finally has attorneys in this case who are
4 willing to advance his positions and policies, he should not have to continue to defend against the
5 attack that has been launched against him by his former attorneys.
6

7 The integrity of the legal profession must be maintained and the appearance of
8 professional impropriety must be avoided, especially in a case of such public importance and
9 attention as this one. The Attorney General's Office must be disqualified.

10 **II. RULES 1.7 AND 1.9 APPLY TO ALL GOVERNMENT LAWYERS**
11 **INCLUDING THE ATTORNEY GENERAL**

12 The 2002 amendments to the ABA's Model Rules of Professional Conduct were
13 adopted and made a part of Guam's Rules on February 11, 2004 by Supreme Court Promulgation
14 Order No. 04-002. Among the new provisions inserted into the Guam Rules by Promulgation
15 Order No. 04-002 is a new Rule 1.11 entitled "Special Conflicts Of Interest For Former And
16 Current Government Officers And Employees." Amended Rule 1.11(d)(1) provides as follows:
17

18 Except as law may otherwise expressly permit, *a lawyer currently serving as a public*
19 *officer or employee: (1) is subject to Rules 1.7 and 1.9;*

20 Unlike old Rule 1.11 which applied only to conflicts of interest arising from
21 successive government and private employment, the new Rule 1.11 imposes the prohibitions
22 against current and former client conflicts (Rules 1.7 and 1.9) upon government attorneys
23 generally, and not just after they have moved to or from the private sector. Comment [1] to ABA
24 Model Rule of Professional Conduct 1.11 ("Paragraphs (a)(1), (a)(2) and (d)(1) restate the
25 obligations of an individual lawyer who has served or is currently serving as an officer or
26 employee of the government toward a former government or private client.").

1 Thus, while decisions from the Guam Superior Court have recognized that the
2 Attorney General's dual role as attorney for the government and guardian of the public interest
3 prevents the mechanical application of Guam's Rules of Professional Responsibility to his office
4 (See e.g. *People v. Castro*, Superior Court of Guam Case No. CF 324-98; *Moylan v. Camacho*,
5 Superior Court of Guam Case No. SP230-03)² it is clear from Promulgation Order No. 04-002
6 that certain core ethical rules such as Rules 1.7 and 1.9 apply to *all* attorneys, including attorneys
7 within the Attorney General's Office.
8

9 There is no Guam statute that exempts the Attorney General's Office from
10 compliance with the Guam Rules of Professional Conduct. If there were such a statute, it would
11 be unconstitutional as being in derogation of the Organic Act, which now vests exclusively
12 authority in the Guam Supreme Court to define and regulate the practice of law and conduct of
13 attorneys practicing on Guam. 48 U.S.C. § 1424-1 (a). ("The Supreme Court of Guam shall be
14 the highest court of the judicial branch of Guam (excluding the District Court) and shall ...
15 govern attorney and judicial ethics and the practice of law in Guam, including admission to
16 practice law and the conduct and discipline of persons admitted to practice law.") (emphasis
17 added). See *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d at 26-27. ("It is the
18 judiciary which has the *exclusive* constitutional prerogative, Const. 1963, art. 3, § 2, to define and
19 regulate the practice of law insofar as judicial proceedings are concerned.") (emphasis in
20 original). The Supreme Court's Promulgation Order No. 04-002 makes it unmistakably clear that
21 government attorneys are not immune from the prohibition against current and former client
22 conflicts in Rules 1.7 and 1.9.
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27 ² The Governor reserves his rights to challenge this order in the appropriate forum.
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1 Long before the 2002 amendments to the ABA Model Rules, the California
2 Supreme Court applied the former client conflicts rule to California's Attorney General. *People*
3 *ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150 (1981). In *Deukmejian*, the Attorney General of
4 California provided advice the Governor regarding proposed legislation. The Governor signed
5 the legislation into law and a few years later some public interest groups brought suit against the
6 Governor and certain state agencies challenging the legislation. The California AG represented
7 the state agencies and gave them advice regarding the pending suit, but later withdrew from their
8 representation and initiated a separate suit against those agencies and the Governor seeking the
9 same relief sought by the public interest groups. *Id.* at 154.

11 The California Supreme Court held that the Attorney General had violated
12 California's ethical prohibition against taking a position adverse to a former client in the same
13 matter. *Id.* at 155. It further held that the Attorney General may withdraw from representation of
14 state agencies if he believes them to be acting contrary to law, but after withdrawing from such
15 representation, he may not then take a position adverse to those same clients. *Id.* at 157. It
16 explained:

19 We have acknowledged 'the Attorney General's dual role as
20 representative of a state agency and guardian of the public interest.'
21 The Legislature has impliedly recognized that a conflict might arise
22 because of that duality by giving the Attorney General the right to
23 withdraw from representation of his statutory clients and to permit
24 them to engage private counsel. *We find nothing in that*
25 *circumstance, however, to justify relaxation of the prevailing rules*
26 *governing an attorney's right to assume a position adverse to his*
27 *clients or former clients, particularly in litigation that arose during*
28 *the period of the attorney-client relationship.* In short, the Attorney
General cannot be compelled to represent state officers or agencies
if he believes them to be acting contrary to law, and he may
withdraw from his statutorily imposed duty to act as their counsel,
but he may not take a position adverse to those same clients.
Id. at 157 (internal citations omitted).

1 Here too, the Attorney General might have avoided eventually switching sides in
2 this litigation by simply determining in advance whether he would be willing to advocate the
3 positions and policies of the various Respondents. Not only did he fail to do this, he actually
4 appeared on behalf of all Respondents and took actions on their "behalf" without their consent.
5 He then fought vigorously to prevent these Respondents from hiring attorneys who would act on
6 their behalf. These actions are far more extreme than the conduct that led to the disqualification
7 of the California Attorney General in the *Deukmejian* case.
8

9 The Attorney General's "dual role" cases such as *State ex rel. Condon v. Hodges*,
10 562 S.E.2d 623 (S.C. 2002) -- which he often cites for the proposition that he may sue his own
11 clients without violating any ethics rules -- do not enable him to avoid disqualification in *this* case.
12 In *Condon v. Hodges*, the Supreme Court of South Carolina held that the Attorney General is
13 permitted to bring suit against his own client (the Governor) without violating the Rules of
14 Professional Responsibility. *Id.* at 632. The Guam Superior Court reached this same result in
15 *Moylan v. Camacho*. *Moylan v. Camacho*, *supra* at 41. However, neither *Condon v. Hodges* nor
16 *Moylan v. Camacho* involved an Attorney General attempting to switch sides against a former
17 client in the same litigation.
18

19 The "dual role" cases stand for the proposition that the Attorney General may
20 represent adverse state agencies in intragovernmental disputes. *See, e.g., Michigan Public*
21 *Service*, 625 N.W.2d at 26-27; *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197 (Me.
22 1989); *State ex rel Allain v. Mississippi Pub. Serv. Comm'n*, 418 So.2d 779 (Miss. 1982). Those
23 cases do not support the conduct of the Attorney General's Office in this case, namely, asserting
24 positions on its own behalf (*i.e.* not on behalf of any particular agency) that are directly adverse to
25 agencies also represented by the Attorney General *in the same matter*. Neither of the Attorney
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1 General's dual roles of defending the Government and protecting the public interest provides any
2 reason that an attorney general should not be subject to the fundamental ethical rules that prevent
3 every attorney from turning on his or her own clients in the same case.

4 One of the Attorney General's dual role cases, *Attorney General v. Michigan*
5 *Public Service*, provides a useful overview of the various "dual role" cases that permit Attorneys
6 General to represent adverse state agencies in intragovernmental disputes. It recognizes that
7 ethics rules cannot be mechanically applied to the Attorney General's Office, but it still concludes
8 that Rule 1.7 must be applied to the Attorney General Office when it is acting as a party litigant
9 against an agency it represents in the same matter. *Michigan Public Service*, 625 N.W.2d at 33.
10 The conclusions it reaches from its survey of the "dual role" line of cases were quoted only
11 partially in an Order prepared by the Attorney General's Office and submitted to the Superior
12 Court of Guam for signature in *Attorney General of Guam v. Y'Asela Pereira, Treasurer,*
13 *Government of Guam*, Special Proceedings Case 32-03:

14 ... the rules of professional conduct do apply to the office of attorney general; while
15 mechanical application of these rules is not possible because of the unique nature of that
16 office, thus allowing dual representation in certain circumstances not otherwise permitted
17 in the arena of private practice, the rules do recognize a clear conflict of interest when the
18 AG acts as a party litigant in opposition to an agency or department that she also
19 represents in the same cause of action ... a conflict is not necessarily automatic
20 disqualification of the Attorney General as counsel for the state agency or, conversely, a
21 bar to the ability of the Attorney General to pursue an action as a active party.

22 *Id.* at 2-3 (quoting *Michigan Public Service Commission*, 625 N.W.2d at 34-35). Remarkably,
23 however, the Order prepared by the Attorney General's Office in *Attorney General v. Periera*
24 omitted the last sentence of the paragraph quoted from *Michigan Public Service* in which the
25 court concluded that the Attorney General in that case would have to get her client's consent in
26 order to avoid disqualification. *Michigan Public Service Commission*, 625 N.W.2d at 35
27 ("Rather, consistent with MRPC 1.7, dual representation is permissible if 'the lawyer reasonably

1 believes the representation will not adversely affect the relationship with the other client' and
2 'each client consents [to dual representation] after consultation.'") (emphasis added). This
3 critical omission of language may explain why the Order prepared by the Attorney General's
4 Office in *Periera* cites *Michigan Public Service* as its support for allowing the Attorney General
5 to represent the Government of Guam in *Periera*, which is the exact opposite of the result reached
6 in *Michigan Public Service*.
7

8 Far from allowing the Attorney General's dual role to immunize her from the
9 requirements of Rule 1.7, *Michigan Public Service* held that "a conflict of interest arises when the
10 Attorney General intervenes as a party in opposition to a state agency that she represents as
11 counsel." *Id.* at 34. The court gave the Attorney General twenty-one days to either substitute out
12 of the case or obtain his clients' consent to the continued representation. *Id.* at 35. Here, as in
13 *Michigan Public Service*, a conflict has arisen because the Attorney General is now directly
14 adverse to his own client. He must now get his clients consent to stay in this case.
15

16 Cases from a number of jurisdictions have recognized that the Attorney General's
17 dual role requires a modified application of the ethics rules, but no case bestows upon him
18 complete immunity from the rules of ethics. Even cases that have relaxed the ethics rules to
19 allow the Attorney General to represent adverse state agencies in intragovernmental disputes have
20 not gone so far as to allow an AG to initially represent a client and then turn against that same
21 client in the same dispute. *Chun v. Board of Trustees*, 952 P.2d 1215, (Hawaii 1998). In *Chun*,
22 the Hawaii Supreme Court recognized that the Attorney General serves dual roles as an advocate
23 of the state's interests and as the attorney for state agencies, but the court still held that the AG
24 may not represent a state client in litigation and then ignore that client's instructions in the same
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1 litigation by filing an appeal against the wishes of her client. *Id.* at 1240. The reasoning in *Chun*,
2 is directly applicable here:

3 We are aware that this court has recognized that, “due to the [Attorney General’s]
4 statutorily mandated role[s] in our legal system, we cannot mechanically apply the
5 [Hawaii] Code of Professional Responsibility [HCRP] to the [Attorney General’s] office.
6 ... We have never held, however, that the Attorney General is relieved of all obligations
to conform her conduct to the HRPC, which are applicable to all lawyers licensed to
practice in the courts of this state.

7 *Id.* at 1236-37.

8 As a practical matter, it may at times be necessary for an AG’s office to represent
9 adverse state agencies in a dispute, particularly if the jurisdiction has an AG’s office large and
10 diverse enough so that a level of independence and separateness may be maintained between the
11 attorneys assigned to represent each respective state agency. *See e.g., State ex el Allain v.*
12 *Mississippi Public Service Comm.*, 418 So2d 779, 784 (Miss. 1982)(“The attorney general has a
13 large staff which can be assigned in such manner as to afford independent legal counsel and
14 representation to the various agencies.”) It is unclear whether the Guam Attorney General’s
15 Office is large and diverse enough to provide truly independent representation to adverse agencies
16 in the same matter. But even if this would be done here on Guam, allowing attorneys within an
17 AG’s office to appear in a case on behalf of adverse state clients is a far cry from allowing an
18 Attorney General to start out representing a particular client in a case, and then later turn against
19 that client in the middle of the same case. Even the most relaxed application of the rules of
20 ethics cannot possibly permit conduct so blatantly unfair to a client or so damaging to the
21 integrity of the legal profession.
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25 *Michigan Public Service* and *Deukmejian* are the two dual role cases most
26 factually similar to this case. Both of these cases recognized that the Attorney General’s dual role
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1 requires a modified application of the rules of ethics, but both still found the Attorney General's
2 conduct warranted disqualification.

3 Here, as in *Deukmejian*, the Attorney General has turned against his own client
4 (now former client) in the same case. *Deukmejian*, 29 Cal.3d at 156 ("While the record here does
5 not reveal whether the Attorney General acquired any knowledge or information from his clients,
6 the prohibition is in the disjunctive: he may not use information or 'do anything which will
7 injuriously affect his former client.' Unquestionably the Attorney General is now acting
8 adversely to the position of his statutory clients, one of which consulted him regarding this
9 specific matter.") (emphasis added). The Attorney General's dual role does not allow him to
10 escape the consequences of switching sides against his own client in the same matter.
11

12 The reasoning in these dual role cases applies with equal force here. While the
13 Attorney General may not be subject to mechanical application of the rules of ethics, he is
14 certainly not so far above the law as to be immune to the requirement of fundamental fairness to
15 his clients. See *Moylan v. Camacho*, Superior Court of Guam Case No. SP230-03, at p. 42
16 ("...no one is above the law"). His actions have violated Rules 1.7 and 1.9 by even the most
17 flexible of applications of those rules.
18

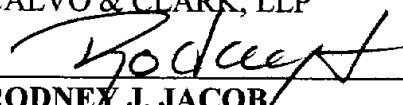
19 CONCLUSION

20 For the reasons set forth herein, the Attorney General's continued representation of
21 any Respondent in this case is a violation of Rules 1.7 and 1.9. The Governor's motion to
22 disqualify should be granted.
23

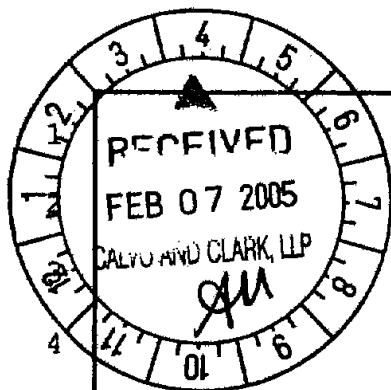
24 Dated this 16th day of February, 2005.

25 OFFICE OF THE GOVERNOR OF GUAM
26 CALVO & CLARK, LLP

27 By:

28 
RODNEY J. JACOB

ATTACHMENT



FILED
DISTRICT COURT OF GUAM

IN THE DISTRICT COURT OF GUAM FEB - 7 2005

TERRITORY OF GUAM

MARY L.M. MORAN
CLERK OF COURT

* * *

JULIE BABAUTA SANTOS,
individually, and on behalf
of all those similarly situated,

Plaintiffs,

vs.

FELIX A. CAMACHO,
Governor of Guam, et al.,

Defendants.

CIVIL CASE
NO. 04-00006

TRANSCRIPT OF PROCEEDINGS

BEFORE

THE HONORABLE JOAQUIN V.E. MANIBUSAN, JUNIOR
Magistrate Judge

HEARING ON MOTIONS

THURSDAY, JANUARY 25, 2005

* * *

Wanda M. Miles

DIRECT EXAMINATION

BY MR. WEINBERG:

Q. Mr. Ilagan, I'm Rob Weinberg for the Attorney General's Office.

You were an original signatory to the settlement agreement, were you not?

A. Yes, sir.

Q. And this is in June of last year?

A. Yes, sir.

Q. Did you have an opportunity to talk to anybody at the Attorney General's Office about that agreement?

A. Prior to signing?

Q. Have you spoken to anyone prior to, to signing it, yes.

MR. CALVO: Objection, Your Honor. My understanding on the proffer by the Attorney General's Office at this preliminary stage is that they were going to strictly delve into the procurement issue and not the other matters that are going to be before the Court later on, I imagine, this afternoon.

THE COURT: Mr. Weinberg, is that a preliminary question?

MR. WEINBERG: Well, Your Honor, I think it goes to the issue of why Mr. Ilagan has requested independent counsel. At one point he was satisfied

1 MR. CALVO: (Overlapping) Your Honor, I'm
2 sorry. I object, Your Honor. The Attorney General's
3 either the attorney for Mr. Ilagan or the former
4 attorney of Mr. Ilagan, and he's cross -- he's
5 examining him on possibly attorney-client privileged
6 information. And this is just entirely inappropriate.
7 I think that the proffer by the Attorney General's
8 Office at the outset that he was going to be concerned
9 with procurement issues, really what he said was the
10 emergency, and what he's going through right now, Your
11 Honor, is really the process of the settlement and the
12 litigation and the implementation of the settlement
13 agreement, which is entirely inappropriate, Your Honor.

14 MR. WEINBERG: Well, I'm trying to get to the
15 question of what's the emergency. So let me ask you
16 that question, Mr. Ilagan.

17 Q. You have filed -- you have signed a
18 declaration stating that there was an emergency; is
19 that not correct?

20 A. Yes.

21 Q. Let me ask you to look in the notebook that
22 should be sitting in front of you.

23 I'm going to try this thing here.

24 MR. MANTANONA: Your Honor, at this point
25 I'm going to object to any further questioning of

1 Mr. Ilagan by the Attorney General's Office, unless
2 the Attorney General's Office is going to withdraw
3 from representation of Mr. Ilagan in this case. He
4 is putting matters before the Court that --

5 THE COURT: Overruled. I think the issue
6 is properly before the Court because he's still the
7 attorney, and there's also an entry of appearance that
8 appears to contradict that representation. I'm going
9 to overrule it for the present time and allow the
10 question to be asked.

11 MR. WEINBERG: (Using the display machine.)
12 For the technically illiterate here --

13 Q. Mr. Ilagan, can you read that, can you see
14 that?

15 A. It's kind of blurry.

16 MR. WEINBERG: Could I get some assistance?

17 MR. CALVO: It's not legible from here.

18 THE COURT: All right. Counsel, why don't you
19 just direct the witness to the exhibit in the binder so
20 we can look at it.

21 BY MR. WEINBERG:

22 Q. Mr. Ilagan, if you would, in the binder in
23 front of you at the tab marked HH there's a number of
24 pages of documents, one, two -- the seventh page of tab
25 HH, do you have it?

1 A. Yes, sir.

2 Q. Is that a document at the top of it says
3 Certificate of Emergency?

4 A. Yes.

5 Q. For procurement of legal services?

6 A. Yes, sir.

7 Q. All right. And that is a document that you
8 signed; is that correct? And it's dated -- what's the
9 date on that?

10 A. (Inaudible.)

11 Q. I'm sorry?

12 A. November 15, 2004.

13 Q. November 15, 2004.

14 So from June 14th, of 2004, until November
15 15th, was there -- was there not an emergency with
16 respect to the Attorney General's representation of
17 you?

18 A. Can you repeat the question?

19 Q. Yeah, that was poorly phrased.

20 November 15th, which is four months after you
21 signed the settlement agreement, you signed a document
22 declaring that you had an emergency on your hands; is
23 that correct?

24 A. Yes.

25 Q. All right. So November 15th, that or

1 thereabouts is when you decided there was an emergency
2 in the provision of legal services to you?

3 A. Yes.

4 Q. Where in, if you know, is -- why did you sign
5 this Certificate of Emergency? Is there a reason you
6 did that, a legal reason, or a reason under Guam
7 regulations that you did that?

8 A. I signed it based on what I wrote on this
9 agreement, I needed representation. I'd been asking
10 for representation for a tax attorney in the past.

11 Q. And in fact you were being represented by
12 Mr. Steve Cohen of the Attorney General's Office?

13 A. It's kind of weird that Steve would represent
14 me when he wrote the ruling not to pay the EIC in the
15 last administration, just a very big conflict there.

16 Q. So, was that -- did you ask the Attorney
17 General for someone other than Mr. Cohen then?

18 A. No, I didn't.

19 Q. What else did you --

20 MR. MANTANONA: Your Honor, I'm going to
21 object to this line of questioning again because, Your
22 Honor, before the Court are the moving papers of the
23 people in this matter's motion of respondents and
24 Attorney General to strike the entry of appearance
25 of Attorney Rawlen Mantanona, page 8, the entry of

Wanda M. Miles

Official Court Reporter

1 A. This was an emergency procurement; does that
2 require the AG's signature?

3 Q. I'm sorry, are you asking me a question?

4 A. See, I don't know the law. You're asking me
5 if I know the law, I'm trying to tell you what I know.

6 MR. MANTANONA: Objection, Your Honor;
7 argumentative.

8 MR. WEINBERG: (Overlapping/unintelligible).

9 THE COURT: Sir, do you want the witness to
10 answer a yes or no or not?

11 MR. WEINBERG: Your Honor, I apologize.

12 MR. MANTANONA: Your Honor, I'm going to
13 object to any leading questions on behalf of
14 Mr. Weinberg to his alleged client Mr. Ilagan in this
15 matter.

16 THE COURT: Well, I'm going to overrule that
17 objection. The matters before the Court seem to be
18 hostile enough to allow leading questions to be asked.

19 BY MR. WEINBERG:

20 Q. My question is whether you did or did not
21 attempt to get the Attorney General's signature.
22 Now I will represent to you that the law is -- requires
23 that. But my question is, whether it requires that or
24 not, did you on the contract you signed with Mr.
25 Mantanona attempt to get the Attorney General's

1 signature? Is his signature on that contract?

2 A. No, it's not.

3 Q. Why is the Attorney General's signature not on
4 that contract, to the extent you know? I'm not asking
5 you to speculate about the Attorney General.

6 A. (No audible response.)

7 THE COURT: I think he's answered that
8 already, Mr. Weinberg. He said that because he thought
9 it was an emergency they didn't need to go through that
10 procedure.

11 BY MR. WEINBERG:

12 Q. Is that your understanding? Your under-
13 standing is that the emergency procurement process
14 does not require going through the Attorney General
15 for the legal contract?

16 A. Yes.

17 Q. Who -- where did you learn, get that
18 understanding?

19 A. Well, I think it's common knowledge; everybody
20 probably knows that, who works for the government.

21 Q. Can you explain the emergency procurement
22 process to me?

23 MR. MANTANONA: Objection, Your Honor; it
24 calls for a legal conclusion or legal opinion.

25 MR. WEINBERG: Only to the extent that he

(Whereupon proceedings concluded at 4:26 p.m.)

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CERTIFICATE OF REPORTER

CITY OF AGANA)
) ss.
TERRITORY OF GUAM)

I, Wanda M. Miles, Official Court Reporter
of the District Court of Guam, do hereby certify the
foregoing pages 1-199, inclusive, to be a true and
correct transcript of the digital recording made of the
within-entitled proceedings, at the date and times
therein set forth.

Dated this 4th day of February, 2005.

Wanda M. Miles

Wanda M. Miles
Official Court Reporter